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October 14, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: June 2, 2004

Case No.: TIA-0104

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant's late husband (the Worker) was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Worker did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be remanded to OWA for further processing.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. The Act provides for two programs for workers.

The Department of Labor (DOL) administers the first program, which provides \$150,000 and medical benefits to certain workers with specified illnesses. Eligible workers include DOE employees and DOE contractor employees who worked at DOE facilities and contracted specified cancers associated with radiation exposure. 42 U.S.C. § 7384l. In general, a worker in that group is eligible for an award if the worker was a member of the Special Exposure Cohort or if it is determined that the worker sustained the cancer in the performance of duty. *Id.* Membership in the Special Exposure Cohort includes DOE employees and DOE contractor employees who were employed prior to February 1, 1992, at a gaseous diffusion plant in Oak Ridge, Tennessee; Paducah, Kentucky; or Portsmouth, Ohio.

The DOE administers the second program. The DOE program is intended to aid DOE contractor employees in obtaining workers' compensation benefits under state law. Under the DOE program, an independent physician panel assesses whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385(d)(3). In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3). As the foregoing indicates, the DOE program itself does not provide any monetary or medical benefits.

To implement the program, the DOE has issued regulations, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The OWA is responsible for this program and has a web site that provides extensive information concerning the program.¹

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request that the DOE's Office of Hearings and Appeals review certain OWA decisions. An applicant may appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal is filed pursuant to that Section. Specifically, the applicant seeks review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

B. Procedural Background

The Worker was employed as a painter at the DOE's Paducah site. The Worker's employment from 1951 to 1955 was verified by affidavit.

The Applicant filed an application with OWA, requesting physician panel review of one illness - multiple myeloma. The Physician Panel rendered a negative determination on the claimed illness and explained the basis of the determination. The OWA accepted the Physician Panel's negative determination on the claimed illness.

The Applicant appeals the negative determination on the claimed multiple myeloma. The Panel agreed that the Applicant had the illness, but the Panel determined that there was insufficient evidence establishing a relationship between any exposures at the Applicant's workplace and the illness.

¹ See www.eh.doe.gov/advocacy.

II. Analysis

Under the Physician Panel Rule, independent physicians render an opinion whether a claimed illness is related to a toxic exposure during employment at DOE. The Rule requires that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12.

We have not hesitated to remand an application where the Panel report did not address all the claimed illnesses,² applied the wrong standard,³ or failed to explain the basis of its determination.⁴ On the other hand, mere disagreements with the Panel's opinion are not a basis for finding Panel error.

In her appeal, the Applicant maintains that the negative determination on the Worker's multiple myeloma is incorrect. First, the Applicant contends that the Panel's determination is inconsistent with the DOL's findings that the Worker was a member of the Special Exposure Cohort and was entitled to an award. Second, the Applicant states that the Panel did not have a copy of the Worker's death certificate. Lastly, the Applicant maintains that the Panel made its determination with the absence of information confirming the entire length of the Worker's employment at the Paducah site. As explained below, the Applicant's first two arguments are not a basis for finding panel error; however, the Applicant's argument relating to the Worker's length of employment is sufficient to warrant further consideration by OWA.

The Applicant's argument that the Panel's negative determination is inconsistent with the DOL's findings is not a basis for finding panel error. The DOL did not find that the Applicant meets the causation standard of the DOE Physician Panel Rule. The Applicant was eligible for an award under the DOL program because the Worker was a member of the Special Exposure Cohort, i.e. he worked at the Paducah site, and he developed multiple myeloma after the beginning of his employment there. See 20 C.F.R. § 30.210. Under the Physician Panel Rule, the Panel can render a positive determination only if the Panel determines that "it is at least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker at issue." 10 C.F.R. § 852.8. Thus, the causation standards of the two programs differ. The preamble to the DOE Physician Panel Rule discusses this difference:

²*Worker Appeal*, Case No. TIA-0030, 28 DOE ¶ 80,310 (2003).

³*Worker Appeal*, Case No. TIA-0032, 28 DOE ¶ 80,322 (2004).

⁴*Id.*

Under the DOL program, a member of a Special Exposure Cohort...who has a specified cancer could establish entitlement to benefits for a specified cancer without showing that the disease is the result of exposure to a toxic substance because the statute dispenses with that requirement for Special Exposure Cohort members in the DOL program. A Physician Panel, however, can make a positive determination only if sufficient evidence is provided to meet the standard as specified in section 852.8.

67 Fed. Reg. 52,849. Thus, the DOL award does not represent a DOL conclusion that the Applicant meets the causation standard of the Physician Panel Rule.

Second, the Applicant's argument that the Panel did not have a copy of the Worker's death certificate is not a basis for finding panel error. A physician panel bases its determination on the record as presented to it. The existence of other information not included in the record does not provide a basis for finding panel error. In any event, we doubt that the death certificate would have changed the panel result. The death certificate states multiple myeloma as the underlying cause of the Worker's death. The Panel agreed that the Worker had the illness; therefore, the inclusion of the death certificate in the record would not have altered the Panel's analysis and its subsequent determination that there was insufficient evidence linking the Worker's illness to occupational exposures.

Lastly, the Applicant's argument that the Panel did not consider the entire length of the Worker's employment at the Paducah site presents a basis for remanding the application to OWA for further consideration. In his application, the Worker listed the following periods of employment: 1951 to 1955, the 1960's, and the mid-1970's. Record at 11-12. The Panel noted that three of the Worker's co-workers confirmed by affidavit that the Worker was employed at the Paducah site from 1951 to 1955. Report at 1; see also Record at 12-13, 15-16, and 18-19. The Panel noted the lack of verifications to validate the remaining period. The record indicates that the DOE has further information concerning the Worker's employment. The DOL Notice of Recommended Decision stated that the Worker's "Personnel Clearance Master Card" established that the Worker was issued clearances during each of the claimed periods of employment.

When an applicant files an application for physician panel review, the DOE "will assist applicants as it is able." 67 Fed. Reg. 52844. Consistent with this goal, the application should be remanded so that OWA can obtain the document referred to in the DOL decision. After receiving the document, OWA should either arrange for further panel review or issue a determination that such review is not warranted.

Based on the foregoing, we have determined that the application should be remanded to the Office of Worker Advocacy for further consideration consistent with this decision.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0104 be, and hereby is, granted as set forth in Paragraph 2 below.
- (2) The application that is the subject of this appeal is remanded to the Office of Worker Advocacy for further processing.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 14, 2004

